APPENDIX 2

[Filed February 28, 1997]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RODNEY GENE BEELER,	) Case No. CV 96-0606-RT
Petitioner,	) **DEATH PENALTY CASE**
v.	) ORDER GRANTING
ARTHUR CALDERON, Warden of San Quentin State Prison,	) PETITIONER'S MOTION TO EXTEND FILING DATE FOR PETITION FOR WRIT OF HABEAS CORPUS AND TO EQUITABLY TOLL THE ONE-YEAR TIME PERIOD IN NEW 28 U.S.C. SECTION 2244(d), AND EXTENDING FILING DATE FOR PETITION FOR WRIT OF HABEAS CORPUS TO OCTOBER 13, 1997
Respondent.	)

Petitioner Rodney Gene Beeler's (petitioner's) motion to extend filing date for petition for writ of habeas corpus and equitably toll the one-year time period in new 28 U.S.C. section 2244(d) (motion) was submitted for decision. The court, the Honorable Robert J. Timlin, has read and considered the moving, opposing, reply papers and respondent's supplement to

its opposition. Based on such consideration, the court concludes as follows:

I.

FACTUAL BACKGROUND

On May 5, 1989, petitioner was sentenced to death by the Orange County Superior Court. The California Supreme Court affirmed petitioner's conviction and sentence of death on direct appeal on April 10, 1995. On November 15, 1995, the California Supreme Court denied petitioner's state petition for habeas corpus. On January 8, 1996, the United States Supreme Court denied his petition for a writ of certiorari.

On January 29, 1996, petitioner filed a pro per request for appointment of counsel and stay of execution with this court. On February 8, 1996, the court stayed petitioner's execution, and on May 22, 1996, appointed California Appellate Project attorneys' Karen Schryver and Scott Braden to represent petitioner. On September 19, 1996 and September 25, 1996, respectively, petitioner and respondent Arthur Calderon, the Warden of San Quentin State Prison (respondent) each filed their first status report. On September 27, 1996, following a status conference, this court ordered petitioner to file his petition on or before March 25, 1997.

On November 4, 1996, Scott Braden filed an ex parte application to withdraw as petitioner's counsel, based on his acceptance of out-of-state employment. On November 6, 1996, this court ordered Richard C. Neuhoff appointed, nunc pro tunc as of October 10, 1996, as second counsel for petitioner, and on November 11, 1996, it granted Scott Braden's application for leave to withdraw as counsel.

On February 3, 1997, petitioner filed the instant motion. According to the declarations of Karen Schryver and Richard Neuhoff, they have been unable to use

much of the work done by Mr. Braden in preparation for filing the petition for habeas corpus.[1] In addition, Ms. Schryver is primary counsel in two other pre-petition federal habeas proceedings, and is responsible for assisting counsel on numerous other state and federal capital cases, and Mr. Neuhoff has a preexisting obligation to prepare a portion of a brief on the merits in a case now before the United States Supreme Court, Lindh v. Murphy, Case No. 96-6298. That brief was due on February 21, 1997, and a reply brief is due on April 7, 1997, with oral argument likely to occur later in April 1997. Thus, while they have both spent time preparing to file the petition in this case, they have been unable to devote their full energies to such effort, and state that they will therefore be unable to file the petition on or before March 25, 1997. They therefore seek an extension of time, specifically 202 days, within which to file the petition, which would extend the filing date to October 13, 1997.

On February 11, 1997, respondent filed his opposition to the motion, contending that the time limitation imposed by Title 28 U.S.C. section 2244(d) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (new section 2244) is a jurisdictional prerequisite to filing a federal petition for habeas corpus, that the time limitation, being jurisdictional rather than like a statute of limitation, is not subject to equitable tolling, and that in any event the requested 202 day extension is unreasonable and unwarranted.

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1. According to Ms. Schryver's declaration, Mr. Braden performed approximately 80 percent of the work on the case, while she was responsible for about 20 percent.

II.

ANALYSIS

A. Good Cause Appears to Grant the Request for an Extension of Time

Based on the declarations of Ms. Schryver and Mr. Neuhoff, the court concludes that an extension of time is necessary pursuant to principles of constitutional due process and the right to effective assistance of counsel to allow counsel time to prepare and file the petition for habeas corpus, and that an extension of 202 days is sufficient. Having concluded that an extension of time is necessary, the court considers whether it can properly grant such an extension of time within which to file the petition, respondent having urged that the time limitation in new section 2244(d) is jurisdictional, and not subject to extension.[2/]

B. The One-Year Period in New Section 2244(d) Is Not Jurisdictional. Instead, It Is the Equivalent of a Statute of Limitations.

Statutory filing deadlines are generally subject to the defenses of waiver, estoppel and equitable tolling, United States v. Locke, 471 U.S. 84, 94 n.10, 105 S.Ct. 1785, 1792 n.10, 85 L.Ed.2d 64 (1985), but such defenses do not apply if the filing period is jurisdictional. Valenzuela v. Kraft, Inc., 801 F.2d 1170,

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2. The court will assume, for the sake of argument, that new section 2244(d) is applicable to this case. It therefore will not address the issue whether, for purposes of the application of the holding in Jeffries v. Wood, 103 F.3d 827 (9th Cir. 1996) and Greenawalt v. Stewart, Nos. 88-1828, 88-1910, and 97-99000, 1997 WL 27116 (9th Cir. Jan. 17, 1997), petitioner's case was "pending" in the federal court upon his filing of his request for appointment of counsel, or whether a case is not pending until the filing of the petition for habeas corpus.

1172 (9th Cir. 1986), amended, 815 F.2d 570 (9th Cir. 1987).

Whether a filing deadline is jurisdictional or in the nature of a statute of limitations is determined by considering the language of the statute as well as the statutory scheme as a whole, the legislative history of the statute, and prior case law. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-398, 102 S.Ct. 1127, 1132-1135, 71 L.Ed.2d 324 (1982) (Zipes).

Here, the one-year period provided in section 2244(d)[3] within which a petition must be filed is couched in terms of a limitation period only, and, like the statute in Zipes, does not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 455 U.S. at 394, 102 S.Ct. at 1133. Furthermore, just as in Zipes, there is an entirely separate provision which does speak to the jurisdiction of the district courts, and that section, section 2241, does not limit jurisdiction to those cases in which there has been a timely filing in the district court. Zipes, 455 U.S. at 393-394, 102 S.Ct. at 1132-1133.

The legislative history, too shows no intent contrary to that expressed in the language of the statute itself. As to prior case law, there is none, this being a newly enacted section.

The court therefore concludes that the one-year time period of new section 2244(d) is not a jurisdictional prerequisite to filing a petition for habeas corpus, but is instead a limitation period.

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3. Section 2244(d) provides, in relevant part: "(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

C. The Doctrine of Equitable Tolling Property May Be Applied to Extend the One-Year Limitation Period of New Section 2244(d)

Historically, federal courts have asserted equitable discretion to craft rules of tolling, laches, and waiver in the application of statutes of limitations. See, e.g., Bowen v. City of New York, 476 U.S. 467, 479, 106 S.Ct. 2022, 2029, 90 L.Ed.2d 462 (1986); Zipes, 455 U.S. 385, 398, 102 S.Ct. 1127, 1135, 71 L.Ed.2d 324; Burnett v. New York Central R. Co., 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). This discretion does not depend on whether or not the statutory scheme provides any or some guidance on the issue of tolling (other than a flat prohibition against it). See, e.g. Burnett v. New York Central R. Co., 380 U.S. at 434, 85 S.Ct. at 1058 (when none of the reasons on which the statute is founded can possibly apply, the federal courts have exercised equitable discretion to suspend the running of the limitations period in conformity with the "policy underlying [the] statute of limitations"); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 559, 94 S.Ct. 756, 769, 38 L.Ed.2d 713 (1974) ("the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose"); Braun v. Sauerwein, 10 Wall. 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself"). In fact, the judicial application of the doctrine of equitable tolling is so customary that the Supreme Court has stated that there is a "rebuttable presumption of equitable tolling" as to which "Congress, of course, may provide otherwise if it wishes to do so." Irwin v. Dept.

of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453,457, 112 L.Ed.2d 435 (1990).[4]

Respondent contends that if Congress had wished to permit equitable considerations for an extension of

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4. Cf. U.S. v. Brockamp, No. 95-1225, ___ U.S. ___, 117 S.Ct. 849, ___, ___ L.Ed.2d ___ (97 Daily Journal D.A.R. 1613) (1997). In U.S. v. Brockamp, the court refused to apply the equitable tolling doctrine to section 6511 of the Internal Revenue Code of 1986 (which limits the time within which to make administrative claims for tax refunds) because (1) the section's time limitations are set forth in an "unusually emphatic form" and in a "highly detailed technical manner;" (2) the section reiterates its limitations several times in several different ways; (3) the section imposes substantive as well as procedural limitations by linking the amount of credit or refund recoverable to the time of filing; and (4) the section set forth very "specific" and "explicit" exceptions to its basic time limits (for refunds related to operating losses, credit carrybacks, foreign taxes, self-employment taxes, worthless securities, and bad debts), which exceptions did not include the grounds urged by the taxpayers as grounds for equitable tolling, i.e., senility or alcoholism. The court also noted that tax law is not normally characterized by case-specific exceptions reflecting individualized equities, and that the nature and potential magnitude of the administrative problems involved in allowing equitable tolling of the tax refund section suggested that Congress was unlikely to have intended to delegate to courts a generalized power to grant equitable tolling relief.

None of the factors which militated against applying the doctrine of equitable tolling in U.S. v. Brockamp exist here. New Section 2244's time limitation is not set forth in an unusually emphatic or highly detailed, technical manner. The time limitation is not reiterated several times in several ways, nor are any substantive limitations imposed. Although new section 2244(d)(2) provides that the time during which a properly filed application for state post-conviction or collateral review shall not be counted toward any period of limitation, this is not an exception to the basic time limit, but a description of a circumstance which would toll the running of the limitations period. Furthermore, criminal law, unlike tax law, is characterized by case-specific exceptions reflecting individual equities, and the potential magnitude of petitions for habeas relief in death penalty cases in which equitable tolling might be sought in no way approaches the potential magnitude of tax retired claims in which such relief might be sought.

the filing deadline on a case by case basis it could have so stated; hence, under the maxim *expressius [sic] unius est exclusio alterius*, this court should presume that, because Congress listed three specific occasions for tolling the filing period in section 154 of the statute, 28 U.S.C. section 2263(b), it did not intend that courts apply the equitable tolling doctrine to section 2254(d) on any other occasions. However, because there is a rebuttable presumption that the doctrine of equitable tolling applies to statutes of limitations unless Congress specifically provides otherwise, this court concludes that that presumption is not rebutted by a negative inference which may be drawn by applying the maxim, see Landgraf v. USI Film Products, 511 U.S. 244, __, 114 S.Ct. 1483, 1494-1495, 128 L.Ed.2d 229 (1994) (court declined to apply the maxim when the result would be to conclude that Congress made known its intent to abandon the general rule against prospective application of a statutory provision only by implication); Cott v. Ash, 422 U.S. 66, 82-83 n.14, 95 S.Ct. 2080, 2090 n.14, 45 L.Ed.2d 26 (1972) (declining to infer Congressional intent by applying the maxim because the court found "this excursion into extrapolation of legislative intent entirely unilluminating"), particularly when it requires applying the maxim to a different code section than that being interpreted.

Respondent also contends that applying the doctrine of equitable tolling to the limitation period in section 2254(d) would directly contradict the holding in Lonchar v. Thomas, ___ U.S. ___, 116 S.Ct. 1293, 134 L.Ed.2d 480 (1996). Not so.

In Lonchar v. Thomas, Lonchar had filed and then dismissed a state habeas petition. Shortly before Lonchar's scheduled execution, he filed another state habeas petition, which was denied. Upon its denial, he filed an "eleventh hour" federal habeas petition for the first time. The State of Georgia moved to dismiss the federal petition on the grounds of Lonchar's "inequitable conduct" in waiting almost six years, and

until the last minute, to file a federal petition. The district court held that Habeas Corpus Rule 9, not some generalized equitable authority to dismiss, governed the case, and hence Georgia's "inequitable conduct" ground could not form the basis for a dismissal. Furthermore, Rule 9's authority to dismiss for "abuse of the writ" applied only to second or successive petitions, not to a first petition. It therefore granted a stay of execution so that it could consider Georgia's other grounds for dismissal.

The next day, the Court of Appeals for the Eleventh Circuit vacated the stay, holding that equitable considerations independent of Rule 9 did apply, and then, "setting aside the Rules and traditional habeas doctrines," the Court of Appeals concluded that under the circumstances of Lonchar's case, Lonchar did not merit equitable relief. ___U.S. at ___, 116 S.Ct. at 1296.

The Supreme Court reversed, concluding that a federal court could not dismiss a valid first habeas petition for "equitable reasons," but instead only could dismiss habeas petitions for the reasons listed in federal statutes and Rules, or for reasons well-established in Supreme Court precedents, ___ U.S. ___, 116 S.Ct. at 1298-1303, because, although the writ of habeas corpus has been called an equitable remedy, "'courts of equity must be governed by rules and precedents no less than the courts of law.' [Citations.]" ___ U.S. at ___, 116 S.Ct. at 1298.

Clearly, nothing in Lonchar's holding precludes this court from concluding, after relying upon the language of new section 2244 and well-established precedent related to statutory interpretation, that the long-established doctrine of equitable tolling can be applied to toll the one-year limitation period of new section 2244; contrary to respondent's assertions, applying the doctrine of equitable toiling to the one-year limitation period is not at all "the type of ad hoc judicial exception-making expressly disapproved of in Lonchar."

The court therefore concludes that the doctrine of equitable tolling applies to the one-year limitation of new section 2244(d).

D. Under the Doctrine of Equitable Tolling, the Court Will Extend the Time Within Which to File a Petition for Habeas Corpus by 202 Days

Respondent "submits" that petitioner has failed to show a sufficient basis for tolling the statute. (Opposition, p. 23, n.7.) However, respondent does not support this submission with any argument or analysis.

In contrast, petitioner contends that he has demonstrated the existence of the four factors which justify application of equitable tolling: (1) due diligence in pursuing his claim; (2) notice to the other party of the pending claim such that it has had an opportunity to preserve appropriate evidence; (3) lack of prejudice to the other party by the passage of additional time; and (4) a result through the application of tolling which is consistent with the general remedial purpose of the statutory scheme under which relief is sought. Salgado v. Atlantic Richfield Co., 823 F.2d 1322, 1326 (9th Cir. 1987); Valenzuela v. Kraft, Inc., 801 F.2d at 1174-1175.

The court concludes that the circumstances of this case justify application of the equitable toiling doctrine. Due diligence in pursuing the claim is shown by the fact that petitioner' s counsel was appointed on March 22, 1996, and between that date and November 1, 1996, counsel with primary responsibility for the case read the reporter's and clerk's transcripts, reviewed appellate and trial counsel's files, and spent a significant amount of time on petitioner's case preparing to file a petition for habeas corpus. Respondent has sufficient notice of petitioner's claims, which to a great extent are stated in petitioner's specification of non-frivolous issues, as filed on May 16, 1996, so that it could preserve appropriate evidence. Further, there is no indication that respondent will be prejudiced if the statute is tolled by the 202

additional days requested by petitioner. Finally, applying the doctrine of equitable tolling when, as here, habeas counsel substitutes out after much of the time for preparing the petition has expired and without leaving much in the way of a finished work product, is consistent with the general remedial purpose of providing habeas petitioners subject to the death penalty with effective assistance of counsel in federal habeas corpus proceedings. McFarland v. Scott, 512 U.S. 849, ___, 114 S.Ct. 2572-2573, 129 L.Ed.2d 666 (1994).

Respondent also contends that any equitable tolling period has already begun to run, and will end on April 23, 1997. Respondent does not explain why such period will end on April 23,1997. The cases it cites without any explanation for this proposition. Block v. N.D. ex rel. Bd. of University & Sch. Lands, 461 U.S. 273, 286 n.23, 75 L.Ed.2d 840, 103 S.Ct. 1811, 1819 (1983); Texaco, Inc. v. Short, 454 U.S. 516, 527 n.21, 70 L.Ed.2d 738, 1023 S.Ct. 781. 791 (1982); Flowers v. Hanks, 941 F.Supp. 765, 771 (N.D.Ind. 1996), merely stand for the proposition that a newly enacted statute of limitations must allow a reasonable time after it takes effect for the commencement of suits upon existing causes of action. Such cases do not have anything to do with when or whether a period of limitations should be tolled for the reasons noted above.

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III.

DISPOSITION

(1) petitioner's motion to extend the filing date for filing his petition for habeas corpus is GRANTED; and

(2) the filing date for the petition for writ of habeas corpus is extended for 202 days from March 25, 1997 to October 13, 1997.

Dated: February 28, 1997

ROBERT J. TIMLIN
DISTRICT COURT JUDGE